



Billing Code 3290-F3

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. USTR-2013-0023]

Identification of Ukraine as a Priority Foreign Country and Initiation of Section 301 Investigation

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of identification of priority foreign country; initiation of investigation; proposed determination; request for written comment; and invitation to participate in public hearing.

SUMMARY: Pursuant to section 182(c)(1)(B) of the Trade Act of 1974, as amended (the Trade Act), in the May 1, 2013 Special 301 Report the United States Trade Representative (Trade Representative) identified Ukraine as a priority foreign country due to Ukraine's denial of adequate and effective protection of intellectual property rights and its denial of fair and equitable market access to persons that rely on intellectual property protection. Pursuant to section 302(b)(2) of the Trade Act, the Trade Representative is initiating a Section 301 investigation of the acts, policies, and practices of the Government of Ukraine that resulted in the identification of Ukraine as a priority foreign country. The Office of the United States Trade Representative (USTR) proposes a determination that these acts, policies, and practices are

actionable under section 301(b). USTR invites interested persons to submit written comments and to participate in a public hearing concerning the issues covered in the investigation.

DATES: The identification of Ukraine as a priority foreign country was made in the May 1, 2013 Special 301 Report. The Trade Representative initiated the Section 301 investigation on May 30, 2013. Persons wishing to testify orally at the public hearing must provide written notification of their intention, as well as a summary of their hearing testimony, by June 27, 2013. A written version of hearing testimony is due by July 11, 2013. The public hearing will be held on July 18, 2013, beginning at 9:30 a.m., at Conference Rooms 1 and 2 at the offices of USTR, 1724 F Street, NW, Washington, DC 20508. Persons wishing to provide written comments and/or rebuttal comments to the hearing testimony must do so by July 31, 2013.

ADDRESSES: Notifications of intent to testify, testimony summaries, written testimony, and comments should be submitted electronically via www.regulations.gov, docket number USTR-2013-0023. If you are unable to provide submissions at www.regulations.gov, please contact Gwendolyn Diggs, Staff Assistant to the Section 301 Committee, at (202) 395-3150, to arrange for an alternative method of transmission.

FOR FURTHER INFORMATION CONTACT: For procedural questions concerning submissions, please contact Gwendolyn Diggs at the above number. Questions regarding this investigation should be directed as appropriate to: Elizabeth Kendall, Director for Intellectual Property and Innovation, Office of the United States Trade Representative, at (202) 395-3580; Isabella Detwiler, Director for Europe, at (202) 395-6146; or Shannon Nestor, Assistant General

Counsel, at (202) 395-3150. General questions regarding Section 301 investigations should be directed to William Busis, Deputy Assistant U.S. Trade Representative for Monitoring & Enforcement and Chair of the Section 301 Committee, at (202) 395-3150. Additional information on the investigation, including any changes in the time or location of the public hearing, will be posted at www.ustr.gov, under Trade Topics - Enforcement.

SUPPLEMENTARY INFORMATION:

1. Identification of Ukraine as a Priority Foreign Country

Section 182 of the Trade Act (19 U.S.C. 2242) authorizes the Trade Representative to identify foreign countries that deny adequate and effective protection of intellectual property rights (IPR) or that deny fair and equitable market access to persons that rely on intellectual property (IP) protection. Procedures under section 182 are commonly referred to as “Special 301.” In making Special 301 determinations, USTR chairs an interagency team that reviews information from many sources, and that consults with and makes recommendations to the Trade Representative on issues arising under Special 301.

Under section 182(b) of the Trade Act, countries that have the most onerous or egregious acts, policies, or practices that have the greatest adverse impact (actual or potential) on the relevant United States products must be identified as “priority foreign countries,” unless they are entering into good faith negotiations or are making significant progress in bilateral or multilateral negotiations to provide adequate and effective protection for IPR and fair and equitable market access for persons that rely on IP protection. Section 182 provides that identification of priority foreign countries shall take into account the history of intellectual property laws and practices of the foreign country, including any previous identifications as a

priority foreign country; and the history of efforts of the United States to achieve adequate and effective protection and enforcement of IPR and fair and equitable market access for persons that rely on IP protection.

In the May 1, 2013 Special 301 Report, the Trade Representative identified Ukraine as a priority foreign country. The identification was the culmination of several years of growing concern over widespread IP theft, including the growing entrenchment of IPR infringement that is facilitated by government actors. During intensive bilateral engagement, Ukraine had made a series of commitments to make specific improvements in the areas of government use of pirated software, nontransparent administration of royalty collecting societies, and online piracy. Notably, Ukraine and the United States agreed to an IPR Action Plan in 2010, which Ukraine publicized in 2011. Implementation of this plan was the subject of intensive bilateral engagement in 2012, including through the Trade and Investment Council meeting. Unfortunately, the situation regarding Ukraine's protection of IPR has continued to deteriorate.

A full discussion of the basis for Ukraine's designation is set out in the May 1, 2013 Special 301 Report, which may be found on www.ustr.gov under 'Reports.' A summary of the basis for identification is set out below.

The first ground for the Trade Representative's identification of Ukraine as a priority foreign country is the unfair, nontransparent administration of the system for collecting societies, which are responsible for collecting and distributing royalties to U.S. and other rights holders. Ukraine has recognized that it has a significant problem with the operation of illegal or "rogue" collecting societies, *i.e.*, organizations that collect royalties by falsely claiming they are authorized to do so. Such organizations tend to operate without adequate transparency and rarely disburse sufficient funds that they collect to the rights holders entitled to the royalties. The

government has not prosecuted several rogue collecting societies — even societies that the Government of Ukraine determined were collecting money without the necessary authorization.

Recent negative developments include the following: In May 2012, the State Intellectual Property Service of Ukraine revoked the authorization of the Ukrainian Music Rights League, a collecting society that had disbursed royalties to rights holders. In August 2012, a Ukrainian court issued a ruling that invalidated Ukraine's procedure for accrediting collecting societies. Currently, there are no authorized collecting societies in Ukraine in important spheres such as public performance rights.

Second, there is widespread use of infringing software by Ukrainian government agencies. The Government of Ukraine acknowledges that a significant percentage of the software used by the government is unlicensed. The Government of Ukraine has further acknowledged the need for the government to use licensed software, and has issued repeated official documents calling for such use as far back as 2002, most recently in April 2013. To date, however, the government has not addressed this problem. Most recently, the Government of Ukraine budgeted 100 million UAH (equivalent to \$12.3 million) for 2013 software licensing in state institutions. However, the Government of Ukraine has not disbursed these funds to rights holders or taken any other concrete steps toward addressing the use of unlicensed software.

Third, the Government of Ukraine has failed to implement an effective and systemic means to combat the widespread online infringement of copyright and related rights, including failures to institute transparent and predictable provisions on intermediary liability and liability for third parties that facilitate piracy; to introduce limitations on such liability for Internet Service Providers (ISPs); and to enforce takedown notices for infringing online content. Online

piracy now has significant and growing consequences for both the Ukrainian market and for international trade. For example, several of Ukraine's BitTorrent sites are among the most popular in markets such as India, illustrating how Ukraine has become perceived as a safe haven for online piracy enterprises serving multiple markets.

There was not a single online piracy-related conviction in Ukraine in 2012. In late January 2012, the Government of Ukraine seized servers as part of a criminal investigation into one of Ukraine's most visited websites that was (and remains) a prolific source of infringing international music, software, and video. However, the site reopened shortly thereafter, and continues to monetize infringing content.

2. Initiation of Section 301 Investigation

Under Section 302(b)(2) of the Trade Act (19 U.S.C. 2412(b)(2)), the Trade Representative shall initiate an investigation under Chapter 1 of Title III of the Trade Act (commonly referred to as "Section 301") with respect to any act, policy, or practice that was the basis of the identification of a country as a priority foreign country under section 182 of the Trade Act. (Section 302(b)(2) provides exceptions where such acts, policies, and practices are already subject to investigation or action under Section 301, or where an investigation would not be in the national economic interest.)

Pursuant to Section 302(b)(2), and in accord with the advice of the interagency Section 301 Committee, on May 30, 2013, the Trade Representative initiated a Section 301 investigation of the acts, policies, and practices of Ukraine that resulted in the priority foreign country identification.

The investigation will examine whether these acts, policies, and practices are actionable under section 301(b) of the Trade Act, and, if so, what action the Trade Representative should

take under Section 301(b). Acts, policies, or practices of a foreign country are actionable under section 301(b) if they are unreasonable and burden or restrict U.S. commerce. Under section 301(d)(3)(B)(i)(II) of the Trade Act, unreasonable acts, policies, or practices include any act, policy, or practice which denies fair and equitable provision of adequate and effective protection of intellectual property rights, notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Furthermore, under section 301(d)(3)(B)(i)(III) of the Trade Act, unreasonable acts, policies, or practices also include any act, policy, or practice which denies fair and equitable nondiscriminatory market access opportunities for persons that rely upon intellectual property protection.

Section 303(a) of the Trade Act provides that on the date of initiation of a Section 301 investigation, the Trade Representative shall request consultations with the foreign country concerned regarding the issue involved in the investigation. In accordance with Section 303(a), by letter dated May 30, 2013, the Trade Representative requested consultations with the Government of Ukraine regarding the issues under investigation. Because the issues under investigation do not involve a trade agreement, the request for consultations does not involve formal dispute settlement procedures under a trade agreement.

USTR will seek information and advice from appropriate representatives provided for under section 135 of the Trade Act in preparing the U.S. presentations for such consultations.

3. Proposed Determination and Schedule for Investigation

USTR proposes a determination under sections 304(a)(1)(A) and 301(b) of the Trade Act that the acts, policies, and practices of Ukraine with respect to intellectual property rights (summarized above) that resulted in the identification of Ukraine as a priority foreign country

under Special 301 are unreasonable and burden or restrict United States commerce. If the Trade Representative makes a final determination under 304(a)(1)(A) that these acts, policies, and practices are actionable under Section 301(b), the Trade Representative also will determine under Section 304(a)(1)(B) what action to take under Section 301(b).

Section 304(a)(3)(A) of the Trade Act provides that in an investigation initiated pursuant to a priority foreign country designation, and not involving a trade agreement, the Trade Representative shall make the determinations under section 304(a)(1)(A) and (B) no later than six months after the date of initiation. Under Section 304(a)(3)(B), in certain circumstances the Trade Representative may extend the investigation for an additional 3 months. In this investigation, unless extended under section 304(a)(3)(B), the determinations under section 304(a)(1)(A) and (B) would be made by no later than November 30, 2013.

4. Public Comments

a. Written Comments

The Section 301 Committee invites interested persons to submit written comments and to participate in a public hearing on the matters under investigation. The subject matter of any written comments and oral testimony may include comments on: (i) The acts, policies, and practices of the Government of Ukraine that are the subject of this investigation; (ii) the amount of burden or restriction on U.S. commerce caused by these acts, policies, and practices; (iii) whether – as described in the above proposed determination -- the acts, policies, and practices of Ukraine are actionable under section 301(b); and (iv) what action the Trade Representative should take under section 301(b).

As noted above, interested persons should submit any written comments, as well as any rebuttal comments to the hearing testimony, by July 31, 2013.

b. Oral Testimony

A public hearing will be held on July 18 in Conference Rooms 1 and 2 at the offices of USTR, 1724 F Street, NW, Washington, DC 20508. Persons wishing to testify at the hearing must provide written notification of their intention by June 27, 2013. The intent to testify notification must be made in the “Type Comment” field under docket number USTR-2013-0023 on the *www.regulations.gov* Web site and should include the name, address, and telephone number of the person intending to present testimony. A summary of the testimony must accompany the notification. After the Chairman of the Section 301 Committee considers the request to present oral testimony at the hearing, the Staff Assistant to the Section 301 Committee will notify the applicant of the time of his or her testimony. A full, written version of hearing testimony is due by July 11, 2013. Remarks at the hearing should be limited to no more than ten minutes to allow for possible questions from the Section 301 Committee.

c. Rebuttal Comments

To allow interested persons an opportunity to contest the information provided by other parties at the hearing, USTR will accept written rebuttal comments, which must be filed by July 31, 2013. Rebuttal comments should be limited to demonstrating errors of fact or analysis not pointed out in the hearing testimony and should be as concise as possible.

5. Requirements for Submissions

Persons submitting written comments, written hearing testimony, or rebuttal comments must do so in English and must identify (on the first page of the submission) the “Ukraine Section 301 Investigation.” Any comments that include quantitative discussions of burdens or restrictions on U.S. commerce should be accompanied by the methodology used in calculating such burdens or restrictions.

To ensure the timely receipt and consideration of comments, USTR strongly encourages interested persons to make on-line submissions, using the *www.regulations.gov* Web site. To submit comments via *www.regulations.gov*, enter docket number USTR-2013-0023 on the home page and click “search.” The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice and click on the link entitled “Comment Now.” (For further information on using the *www.regulations.gov* Web site, please consult the resources provided on the Web site by clicking on “How to Use This Site” on the left side of the home page).

The *www.regulations.gov* Web site allows users to provide comments by filling in a “Type Comment” field, or by attaching a document using an “Upload File” field. USTR prefers that comments be provided in an attached document. If a document is attached, it is sufficient to type “See attached” in the “Type Comment” field. USTR prefers submissions in Microsoft Word (.doc) or Adobe Acrobat (.pdf). If the submission is in another format, please indicate the name of the software application in the “Type Comment” field.

For any comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters “BC”. Any page containing business confidential information must be clearly marked “BUSINESS CONFIDENTIAL” on the top of that page. Filers of submissions containing business confidential information must also submit a public version of their comments. The file name of the public version should begin with the character “P”. The “BC” and “P” should be followed by the name of the person or entity submitting the comments. Filers submitting comments containing no business confidential information should name their file using the name of the person or entity submitting the comments.

Please do not attach separate cover letters to electronic submissions; rather, include any information that might appear in a cover letter in the comments themselves. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file as the submission itself, not as separate files.

As noted, USTR strongly urges submitters to file comments through *www.regulations.gov*, if at all possible. Any alternative arrangements must be made with Gwendolyn Diggs in advance of transmitting a comment. Ms. Diggs should be contacted at (202) 395-3150.

6. Public Docket

Submissions will be placed in the docket and open to public inspection pursuant to 15 CFR 2006.13, except business confidential information exempt from public inspection in accordance with 15 CFR 2006.15. Submissions may be viewed on the *www.regulations.gov* Web site by entering docket number USTR-2013-0023 in the search field on the home page.

William Busis

Chair, Section 301 Committee.

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